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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 919

BOARD OF COUNTY COMMISSIONERS OF MARSHALL COUNTY, STATE OF OKLAHOMA, ET AL.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 919

BOARD OF COUNTY COMMISSIONERS OF MARSHALL COUNTY, STATE OF OKLAHOMA; CLAUD ALLEN, County Treasurer of Marshall County, Oklahoma; GENEVA TEAFATILLER, County Assessor of Marshall County, Oklahoma and JACK H. SMITH, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit of Appeals for the Tenth Circuit entered on the 20th day of December, A. D., 1945 (R. 30), affirming the judgment of the District Court of the United States for the Eastern District of Oklahoma.

Opinions Below

The District Court for the Eastern District of Oklahoma did not write an opinion. It did make findings of fact and

conclusions of law (R. 17-21). The opinion of the Circuit Court of Appeals (R. 26-30) is not yet officially reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered December 20, 1945. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

Houston Ward, a full-blood Chickasaw Indian, Roll No. 2922, received an allotment of 224.25 acres of land in Marshall County, Oklahoma. Of this, 94.25 acres constituted his homestead allotment and 130 acres his surplus allotment. Prior to 1928, he had sold 120 acres of the surplus with the approval of the Secretary of the Interior. Thus, when the Act of May 10, 1928, 45 Stat. 495, became effective, Ward held title to 94.25 acres, his homestead allotment, and to ten acres of his surplus allotment (R. 17-19).

Section 4 of the Act of May 10, 1928, provided that on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of 160 acres should be subject to taxation by the State of Oklahoma; that the Indian owner of restricted land, if an adult and not legally incompetent, should select from his restricted land a tract or tracts, not exceeding 160 acres, "to remain exempt from taxation," and should file with the Superintendent of the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected; that where the Indian should fail, within two years from the date of the Act, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection should be made and the

certificate prepared by the Superintendent; that such certificate should be subject to approval by the Secretary of the Interior and, when approved, should be recorded in the office of the Superintendent and in the county records of the county in which the land is situated; and that such "lands, designated and described in the approved certificates so recorded," should "remain exempt from taxation while the title" remained "in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land," but that the tax exemption should not extend beyond the period of restrictions provided for in the Act.

The allottee, in pursuance of the above Act, executed a certificate designating his homestead allotment containing 94.25 acres to be tax exempt. This designation was approved by the Secretary of the Interior and recorded in the office of the Superintendent of the Five Civilized Tribes in Oklahoma and in the office of the County Clerk of Marshall County, Oklahoma, where the land is situated. The allottee did not include the ten acres involved in this case (R. 19, Paragraph VII).

No certificate having been filed on the ten acres involved herein, the land was placed on the tax rolls for the years 1935 to 1940 inclusive. The land was sold at tax sale by the taxing officials of the State of Oklahoma in the month of April, 1942, and no one offering the amount of taxes, it was sold to Marshall County, and a deed was executed to the Chairman of the Board of County Commissioners of Marshall County, Oklahoma (R. 19-20, Paragraph X).

Thereafter and on July 21, 1942, Jack H. Smith purchased the land from the Board of County Commissioners of Marshall County, Oklahoma (R. 20, Paragraph XI). Suit was filed by respondent to cancel the deeds and adjudge

the land exempt from taxation (R. 1-5). With the foregoing in mind, the question is:

WHETHER OR NOT, IN THE EVENT THE INDIAN ALLOTTEE DESIGNATES 94.25 ACRES OF HIS LAND, OMITTING TEN ACRES THEREOF; AND THIS DESIGNATION IS ACCEPTED BY THE SUPERINTENDENT OF THE FIVE TRIBES AND APPROVED BY THE SECRETARY OF THE INTERIOR AND RECORDED IN THE OFFICE OF THE SUPERINTENDENT AND IN THE OFFICE OF THE COUNTY CLERK WHERE THE LAND IS LOCATED; AND THE TEN ACRES NOT DESIGNATED IS SOLD BY THE TAXING OFFICIALS OF THE STATE OF OKLAHOMA, AND A DEED IS EXECUTED TO THE PURCHASER; DOES THE SUPERINTENDENT HAVE AUTHORITY, WITH THE APPROVAL OF THE SECRETARY OF THE INTERIOR, UNDER SECTION 4 OF ACT OF MAY 10, 1928, TO SET ASIDE THE TAX DEED SO ISSUED BY FILING A CERTIFICATE AFTER THE EXECUTION AND DELIVERY OF THE TAX DEED, AND AFTER A PERIOD OF MORE THAN FOURTEEN YEARS FROM THE DATE OF THE ACT OF MAY 10, 1928?

Statute Involved

The Act of May 10, 1928, 45 Stat. 495, reads:

> Be is enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: Provided, That the Secretary of the Interior shall have the authority to remove the restrictions, upon the applications of the Indian owners of the land, and may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.
>
> Sec. 2. That the provisions of section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), entitled "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," as amended by sec-

tion 1 of the Act of April 12, 1926 (Forty-fourth Statutes at Large, page 239), entitled "An Act to amend section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), and for putting in force, in reference to suits involving Indian titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes," be, and are hereby, extended and continued in force for a period of twenty-five years from and including April 26, 1931, except, however, the provisions thereof which read as follows:

"Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the lands shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided, That the word "issue," as used in this section, shall be construed to mean child or children: Provided further, That the provisions of section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section:"

which quoted provisions be, and the same are, repealed, effective April 26, 1931: Provided further, That the provisions of section 23 of the Act of Congress approved April 26, 1906 (Thirty-fourth Statutes at Large, page 137), as amended by the provisions of section 8 of the Act of Congress approved May 27, 1908 (Thirty-fifth Statutes at Large, page 312), be, and the

same are hereby, continued in force and effect until April 26, 1956.

Sec. 3. That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production.

Sec. 4. That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted lands: Provided, That the Indian owner of restricted lands if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation and shall file with the superintendent for the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: And provided further, That in cases where such Indian fails, within two years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection shall be made and certificate prepared by the superintendent for the Five Civilized Tribes; and such certificate, whether by the Indian or by the superintendent for the Five Civilized Tribes, shall be subject to approval by the Secretary of the

Interior and, when approved by the Secretary of the Interior, shall be recorded in the office of the superintendent for the Five Civilized Tribes and in the county records of the county in which the land is situated; and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: Provided, That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: And provided further, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

Sec. 5. That this Act shall not be construed to reimpose restrictions heretofore or hereafter removed by the Secretary of the Interior or by operation of law, nor to exempt from taxation any lands which are subject to taxation under existing laws.

Approved, May 10, 1928.

Statement

The allottee, Houston Ward, in the year 1905 was allotted 224.25 acres of land in Marshall County. 130 acres was surplus and 94.25 acres was homestead. Prior to the Act of May 10, 1928, he sold 120 acres of his surplus land. On the effective date of said Act he owned 104.25 acres of restricted land. In accordance with section 4 of the Act of May 10, 1928, he executed a designation of the 94.25 acres of land. This designation was approved by the Secretary of the Interior and was recorded with the Superintendent of the Five Civilized Tribes and in the office of the County Clerk of Marshall County. The ten acres involved herein was not included in the designation. The allottee was not a minor and was not legally incompetent. The ten acres was placed on the tax rolls for the years 1935 to 1940 inclusive, and was sold by the State of Oklahoma in April,

1942, and petitioner, Jack H. Smith, became the purchaser after it was sold to Marshall County. The deed to Jack H. Smith was dated in July, 1942. Thereafter and on the 16th day of March, 1943, the Superintendent of the Five Civilized Tribes designated the ten acres involved herein, and the Secretary of the Interior approved the designation of the ten acres, and it was recorded in the office of the County Clerk of Marshall County on May 15, 1943 (R. 17-21). It was admitted the tax sale was valid if the land was taxable (R. 20, Paragraph XII).

Respondent on October 30, 1944, filed suit to cancel the tax deed and enjoined the further levying of taxes claiming the land involved was exempt from taxation (R. 1-5). Petitioner filed answer (R. 5-9) denying the land was exempt from taxation. The District Court rendered judgment canceling the deed and enjoining the further levying of taxes (R. 21-23). Petitioner appealed to the Tenth Circuit Court of Appeals, and that court affirmed the judgment of the District Court (R. 30).

Specification of Errors to Be Urged

The court below erred:

IN HOLDING UNDER THE ACT OF MAY 10, 1928, THE SUPERINTENDENT OF THE FIVE CIVILIZED TRIBES, WITH THE APPROVAL OF THE SECRETARY OF THE INTERIOR, HAD THE POWER TO SET ASIDE A TAX DEED DULY EXECUTED BY THE OFFICIALS OF THE STATE OF OKLAHOMA.

Reason for Granting the Writ

Over half of the counties of the State of Oklahoma are effected by the decisions in this case. Since January 1, 1932, the taxing officials of the State of Oklahoma have placed on the tax rolls all lands upon which a tax exempt certificate had not been filed. The budgets of the school districts, cities and counties, of the State of Oklahoma, as

to needs, are itemized and allowed by the excise board, and a sufficient tax levied to raise by taxation the approved budget. It is assumed by them that the land included in the assessment is taxable, and sufficient taxes are levied so that the warrants issued in pursuance of the approved estimates will be paid. The taxing officials list all lands for taxation unless the record affirmatively shows the land to be non-taxable. See title 68 O. S. A. 1941, Section 15.1 to Section 15.63.

From time to time the Superintendent of the Five Civilized Tribes, with approval of the Secretary of the Interior, has indulged in the practice of filing belated tax exemption certificates. The filing of these certificates in most instances is after a tax deed has been issued, and in all cases after many years taxes have been levied. This practice by the Superintendent, with the approval of the Secretary of Interior, has disrupted the orderly tax collecting machinery of the municipalities of the State of Oklahoma. It necessitates the refunding of maturing bonds. It causes warrants to be sold for less than their face value. It prevents tax sales from being effective because of the doubt cast upon them. The effect of the exercise of the purported privilege above stated by the Superintendent, with the approval of the Secretary, is that counties not effected by this practice have never been forced to discount their warrants, and few, if any, have had to refund their bonds, and instead of a deficiency in the sinking fund they generally have a surplus.

The construction placed on the Act of May 10, 1928, by the lower court is contrary to the following rules of statutory construction:

(a) The statutes should be construed as a whole. See Castanzo vs. Tillinghast, 287 U. S. 341, 77 L. Ed. 350; Ginsberg & Sons vs. Popkin, 285 U. S. 204, 76 L. ed. 704; McDonald vs. Thompson, 305 U. S. 263, 83 L. ed. 164.

(b) The plain words of the Statute should control. Michigan vs. Michigan Trust Company, 286 U. S. 334, 76 L. ed. 1136; Helvering vs. City Bank Farmers Trust Co., 296 U. S. 85, 80 L. ed. 62; United States vs. Missouri Pac. R. R. Co. 278 U. S. 269, 73 L. ed. 322.

(c) The construction of a particular act must be made in connection with previous legislation on the same subject. See North American Commercial Co. vs. United States, 171 U. S. 110, 43 L. ed. 98; Corraletor Co. vs. U. S., 178 U. S. 280, 44 L. ed. 1069.

The Act of June 28, 1898, including the original Atoka Agreement, 30 Stats. 495, and the Supplemental Agreement of March 1st, 1902, 32 Stats. 641, provided for the allotment of lands to the members of the Choctaw and Chickasaw tribes of Indians; for disposition of surplus tribal lands; for certain restrictions on the allotted lands; for same to be inalienable and nontaxable for a period of twenty-one (21) years from date of patent; for the platting of townsites; for the dissolution of tribal government; for jurisdiction of civil and criminal matters in federal territorial courts; for the preparation of a roll of citizens of the two tribes and also freedmen; for the Indians and freedmen to become citizens of the United States of America.

The above acts and agreements evidenced a purpose on the part of the Indians and the United States, for the Indians to be gradually emancipated and for them to become a part of the body politic of the United States and for them to assume the responsibilities of citizenship generally at the earliest possible date.

It should be borne in mind that prior to these agreements white men from adjacent and other states had become numerous among the Indian tribes. There were many intermarried whites and it was likely through their influence that the agreements were made. At that time the Indian was assuming many of the traits and customs of the white man.

On account of the influence of the white man in the then Territory and many of the Indians, Congress passed the General Act of May 27, 1908, 35 Stats. 312, which removed many of the restrictions on alienation of the allotted lands. This act provided that all lands, including homesteads of intermarried whites, freedmen and mixed bloods of less than one-half, should be free from all restrictions and all land, except homesteads of allottees enrolled as mixed bloods having one-half and less than three-fourths Indian blood, was made free from all restrictions. Provision was made in the Act, Section 1, for the above and also for removal of restrictions by the Secretary of the Interior under rules and regulations to be prescribed by him. Section 4 of the Act then provided:

> "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes:"

The above portion of the 1908 Act evidenced a purpose on the part of Congress to, at that time, compel the class of Indians, upon whom restrictions were removed as to the alienation of their lands, to assume the responsibilities of citizenship by requiring them to pay taxes. Doubtless, Congress, at that time, in the exercise of its plenary power, thought it best that this class of Indians pay taxes and thus help support schools and government and build roads and develop the State of Oklahoma generally.

However, the desire of Congress in this respect was defeated. This was because of the obligations in the agreements above referred to. In the case of *Choate* v. *Trapp, Secretary of the State Board of Equalization of Oklahoma*, 224 U. S. 665, 56 L. ed. 941, 32 S. Ct. 565, this court held that the tax exemption and nonalienability were two sepa-

rate and distinct subjects. One conferred a right and the other imposed a limitation. The court held, in effect, that since the Indian member of the tribe forfeited and gave up his right or interest in the tribal property for an allotment in severalty with the understanding that it would be nontaxable for twenty-one (21) years and since the Indian was a citizen of the United States the Congress was without power and authority to tax or permit the property to be taxed. This last stated decision prevented the State of Oklahoma from levying an ad valorem tax.

In the case of *Choctaw, Oklahoma & Gulf Railroad Company* v. *Harrison, Sheriff of Pittsburg County, Oklahoma,* 235 U. S. 292, 59 L. ed. 234, this court held the State of Oklahoma could not collect a gross revenue tax on coal mined from the Indian land.

In the case of *Indian Territory Illuminating Oil Company* v. *State of Oklahoma,* 240 U. S. 522, 60 L. ed. 779, this court held the State of Oklahoma could not tax the capital stock of a corporation engaged in producing oil and gas under a lease approved by the Secretary of the Interior.

In the case of *Carpenter, et al.,* v. *Shaw, State Auditor of Oklahoma,* 50 S. Ct. 121, 74 L. ed. 478, 280 U. S. 363, this court held gross production tax on oil even though an "in lieu" tax would be void.

The non-taxable clause of the original agreements have been faithfully protected by the courts. This is true of the Federal decisions as well as the State of Oklahoma decisions.

This court also held, in the case of *Fink, et al., Trustees &c.,* v. *Board of County Commissioners of Muskogee County, Oklahoma, et al.,* 248 U. S. 399, 63 L. ed. 324, that when an Indian conveyed the property to another person that he could not convey the non-taxable right and that the land became taxable.

From the above and foregoing it can be plainly seen that Congress lost its authority by reason of the agreements first stated to tax the property of these allottees. The courts held they could not be taxed and the courts further held that when the lands were alienated they could be taxed. Therefore, Congress could not do anything about taxing the Indian land. This is material in interpreting the statute under consideration. Most of the patents bore date of 1905 and 1906 and thus Congress, just as soon as it had power to do so, enacted Section 4 of the Act of May 10, 1928, 45 Stats. 495.

The original treaties, the Act of May 27, 1908, extended restrictions only until April 26, 1931. In the absence of the Act of May 10, 1928, the land of all the Indians, allotted, inherited, restricted, or otherwise, would have become subject to sale and taxable. However, the Act of May 10, 1928, extended those restrictions and also extended the tax exemption on certain conditions set forth in the Act. The Act of May 10, 1928, was passed by Congress anticipating that restrictions would be removed on all Indian land in Oklahoma. In the absence of an extension on April 26, 1931, the same would become taxable as of January 1, 1932.

Section one extends the restrictions on the alienation of allotted lands for a period of twenty-five years from April 26, 1931, with provision for removal of restrictions by the Secretary of the Interior, under rules to be prescribed by him.

Section two extends the restrictions contained in section nine of the act of May 27, 1908, 35 Stat. 312, as amended by the act of April 12, 1926, 44 Stat. 239, except the "Too-Later" provision was eliminated and the provisions of section twenty-three of the Act of April 26, 1906, 34 Stat. 137 as amended by the Act of May 27, 1908, relative to Indian Wills, were continued in full force and effect until April 26, 1956.

Section three made all minerals, including oil and gas, after April 26, 1931, subject to State and Federal taxes.

Section four stated that all allotted, inherited and devised restricted land of Indians, in excess of 160 acres, shall be subject to taxation by the State of Oklahoma, under and in accordance with the laws of that State. It is then provided that the Indian owner, of restricted land, shall select, not to exceed 160 acres, "To Remain" exempt from taxation and shall file with the Superintendent of the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected. It is further provided that when the Indian fails for two years from the date thereof to file such certificate, the selection shall be made and certificate prepared by the Superintendent and whether the certificate is made by the Indian or the Superintendent it shall be subject to the approval of the Secretary of the Interior and when approved the same shall be recorded in the office of the Superintendent of the Five Civilized Tribes and in the records of the County in which the land is situated, and the land so designated and described and approved in the certificate, so recorded, shall "Remain" exempt from taxation, while the title remains in the Indian. The exemption shall not extend beyond the period of restrictions provided for in the act and shall not exceed 160 acres.

By section four, Congress said the Indians should have only 160 acres "to remain exempt from taxation" and said if the Indian is an adult and not legally incompetent he should file the certificate designating the 160 acres. Congress then stated if the Indian failed, after two years, or if the Indian was a minor or legally incompetent the Superintendent should file the designation, and in either event it would be subject to the approval of the Secretary of the Interior, and when approved it should be recorded in the office of the Superintendent and in the county where the land is located and the land designated and described in the

approved certificate so recorded "shall remain exempt from taxation".

The Act shows beyond question that Congress realized all this Indian land would become taxable on January 1, 1932, in the State of Oklahoma, and section four set forth how certain parts could be made tax exempt. The phrases "to remain exempt from taxation" and "shall remain exempt from taxation" show conclusively Congress was legislating for a date in the future, and the phrase in the first line "that on and after April 26, 1931" shows that Congress was legislating in view of the fact that the land would become taxable after April 26, 1931. Congress then stated in plain unambiguous language how the land could be made non-taxable. The language is plain. The court below separated section four from the other part of the act and reasoned that since section one extended the restrictions it would automatically extend the tax exemption. It is erroneous, however, to separate the Act into parts and insulate one section from the other. The Act should be construed as a whole. Other legislation on the same subject should be considered. The plain words of the statute should prevail.

The rule that treaties and statutes will be construed most favorable to the Indians has been carried too far. For example, in the case of the *United States* v. *William*, 139 Fed. 2nd 83, the Circuit Court for the Tenth Circuit held that section one of the Act of May 10, 1928, extended restrictions on land purchased with restricted funds. The Act said the restrictions on alienation of the "lands allotted to members of the Five Civilized Tribes in Oklahoma" are extended for a period of twenty-five years. In effect that court in the above case held that allotted land included lands "purchased with restricted funds". This court denied certiorari. See same case, 322 U. S. 727. This decision upset title to thousands of acres of land. Some of this land was greatly improved. Many home owners were

looking the section line square in the face, although they had paid a fair price for land purchased on the recommendation of the best title attorneys in the State of Oklahoma. Not only did this decision adversely affect the title of farmers and home owners, but also affected the title of the most careful purchasers of land such as oil companies who anticipated spending thousands of dollars in drilling operations. We say this to show the court that the construction was entirely beyond the thought of the most careful and prudent title examiners in the State of Oklahoma. The deeds on their face recited that the land would be restricted only until April 26, 1931. The writer does not know of any attorney who even suspected the Act of May 10, 1928, extended such restriction.

This construction by the courts required a curative Act on the part of Congress. So many people were affected adversely that Congress did correct the error. Section one of the Act of July 2, 1945, reads:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no conveyance made by an Indian of the Five Civilized Tribes on or after April 26, 1931, and prior to the date of enactment of this Act, of lands purchased prior to April 26, 1931, for the use and benefit of such Indian with funds derived from the sale of, or as income from, restricted allotted lands and conveyed to him by deed containing restrictions on alienation without the consent and approval of the Secretary of the Interior prior to April 26, 1931, shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior: Provided, That all such conveyances made after the date of the enactment of this Act must have the consent and approval of the Secretary of the Interior: Provided further, That if any such conveyances are subject to attack upon grounds other than the insufficiency of ap-

proval or lack of approval such conveyances shall not be affected by this section.

Another example of the failure of the courts to determine the legislative intent is demonstrated by the case of *Murray* v. *Ned*, 135 Fed. 2nd 407. In that case the Tenth Circuit Court of Appeals held land inherited by full-blood Indians, even though it was purchased by their decedent with unrestricted funds, was restricted under section eight of the Act of January 27, 1933, 47 Stats. 777. The effect of this decision was to cast a cloud on the title to all land in Oklahoma that had been inherited since January 27, 1933. In order to make title marketable it would be necessary to establish judicially that the heirs of any decedent were not full-blood Indians. This court denied certiorari. See same case, 320 U. S. 781. This decision was an assault on titles generally in Oklahoma, and it caused Congress to enact curative legislation. Section two of the Act of July 2, 1945, reads:

> That nothing contained in the Act of January 27, 1933 (47 Stat. 777), shall be construed to impose restrictions on the alienation of lands or interests in lands acquired by inheritance, devise, or in any other manner, by Indians of the Five Civilized Tribes, where such lands, or interest therein, were not restricted against alienation at the time of acquisition, and all conveyances executed by Indians of the Five Civilized Tribes after January 27, 1933, and before the date of approval of this section, of lands, or interests in lands, which, at the time of acquisition by them were free from restrictions, are hereby confirmed and declared to be valid, irrespective of whether such conveyances were or were not approved by the Secretary of the Interior, or by any county court of the State of Oklahoma: Provided, That if any such conveyances are subject to attack upon grounds other than the insufficiency of approval or lack of approval such convey-

> ances shall not be affected by this section: Provided further, That the provisions of this section shall not be construed to validate or confirm any conveyance made in violation of restrictions recited in any deed to lands purchased with the restricted or trust funds belonging to any Indian of the Five Civilized Tribes.

Another example is a decision of this court in the case of *United States of America* v. *D. B. Hellard,* 322 U. S. 363, 88 L. Ed. 1326. This court held in effect all partition proceedings under the Act of June 14, 1918, would be void unless the United States was made a party to the proceedings. This decision upset the title to thousands of tracts of land in Oklahoma. Many home owners who had bid against the entire world for their land and who had improved it faced the prospect of losing their homes. Congress, however, corrected this decision by curative legislation. Section three of the Act of July 2, 1945, reads:

> That no order, judgment, or decree in partition made, entered, or rendered subsequent to the effective date of the Act of June 14, 1918 (40 Stat. 606), and prior to the effective date of this Act, and involving inherited restricted lands of enrolled and unenrolled members of the Five Civilized Tribes, shall be held null, void, invalid, or inoperative, nor shall any conveyance of any land pursuant to such order, judgment, or decree be held null, void, invalid, or inoperative because the United States was not a party to such order, judgment, or decree, or to any of the proceedings in connection therewith, or because the United States, its agents, or officers, or any of them, was not served with any notice or process in connection therewith, and all such orders, judgments, decrees, and conveyances, which are subject to attack solely by reason of any of the infirmities enumerated by this section, are hereby confirmed, approved, and declared valid.

The writer does not intend in this brief to state that the above opinions, even if allowed to stand and even if Con-

gress had not seen the lamentable situation and corrected it, that we would not have had a state. We would still all have been here, or substantially all of us, but land would have been worth less in value because of the uncertainty in titles and because of the great trouble and expense of perfecting titles. The reason land is more valuable in the United States than in Old Mexico is because of the stability of titles. When titles are continually assaulted either by the legislative branch or the judicial branch they prevent progress. Individuals will not spend a fortune of a lifetime improving a piece of property which will set in action highly productive processes when no one can tell them that they have good title. Progress is dependent upon stability of titles.

In all humility the writer suggests that this court and the Tenth Circuit Court of Appeals have misconstrued the congressional intent as evidenced by the above Act of Congress. All rules of statutory construction have as their ultimate goal the determination of the legislative intent. The court should be careful not to absorb by judicial construction the authority given to Congress. This court should be careful not to, by judicial construction, take away rights given by Congress to the taxing municipalities of the State of Oklahoma. It should be borne in mind that the Indians of Oklahoma are not wild.

Oklahoma has never maintained a militant lobby in Washington for enactment of laws against the Indian. The Indian has been accepted socially and in every respect in the State of Oklahoma. Most of the Indians are mixed blood. Indians in Oklahoma hold office without discrimination. Many individuals in Oklahoma of Indian blood have been very successful and have rendered great service to the people of Oklahoma, as well as the world. The writer has in mind the Honorable Robert L. Owen, former United States Senator from Oklahoma, and Will Rogers. There

is no occasion for the courts by the use of a "favoritism rule" to destroy the will of Congress and retard the progress of the State of Oklahoma. The office of a Proviso is to prevent misinterpretation. See *White* v. *United States*, 191 U. S. 545, 48 L. ed. 295.

Now, if this court affirms the judgment of the court below how could Congress use language stronger than they used in section four of the Act of May 10, 1928, unless they would just say that it was intended that the land should be taxable and all tax titles acquired are hereby validated. Congress said it was extending the restrictions on alienation, and that the Indian could have, not to exceed 160 acres, of tax exempt restricted land, and then it is specifically provided how this should be done. The Indian is given two years to file a designation, if an adult and not legally incompetent. The Superintendent has no authority under the Act except when (1) the Indian fails to make the designation; (2) the Indian is a minor; (3) the Indian is legally incompetent. The Record affirmatively shows that Houston Ward was an adult, legally competent, and that he made his own designation, and it was accepted by the Superintendent and approved by the Secretary of the Interior and duly filed. Therefore, the belated certificate filed by the Superintendent was not even authorized by the Act.

Also, in the face of this Act of Congress the court below held the designation by the Superintendent, with approval of the Secretary of the Interior, operated retroactively in such a way as to cancel the tax deed held by the petitioner, Jack H. Smith. Certainly there is nothing in the Act which would indicate that the filing of the certificate would operate in such a manner. Clearly under the Act of Congress the land would "remain exempt from taxation" after the certificate is filed. The land was not to be exempt from taxes until after the certificate was filed. It would not be exempt,

therefore, until after the certificate was filed. Therefore, a tax deed issued prior to the filing of certificate should not be set aside by subsequent filing of such certificate.

The effect of the holding of the court below is to give the Superintendent of the Five Tribes of Oklahoma, with the approval of the Secretary of the Interior, jurisdiction to set aside a tax deed issued by the State of Oklahoma, which is admitted to have been legally and regularly issued, except for this authority. Surely Congress did not intend such an absurd result.

Conclusion

Wherefore, it is respectfully requested that this petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit be granted.

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INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 919

BOARD OF COUNTY COMMISSIONERS OF MARSHALL COUNTY, STATE OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law appear in the record at pages 17–21. The opinion of the circuit court of appeals (R. 26–30) is reported in 152 F. 2d 540.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered on December 20, 1945 (R. 30). The petition for a writ of certiorari was filed on March 7, 1946. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a restricted allotment of less than 160 acres was tax exempt under the Act of May 10, 1928, even though not designated as tax exempt until after it had been sold for taxes.

STATUTE INVOLVED

The pertinent portions of the Act of May 10, 1928, 45 Stat. 495, as amended by the Act of May 24, 1928, 45 Stat. 733, are as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: *Provided,* That the Secretary of the Interior shall have the authority to remove the restrictions, upon the applications of the Indian owners of the land, and may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.
>
> * * * * *

SEC. 4. That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: *Provided,* That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres to remain exempt from taxation, and shall file with the Superintendent of the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: *Provided further,* That in cases where such Indian fails, within two years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection shall be made and certificate prepared by the Superintendent for the Five Civilized Tribes; and such certificate, whether by the Indian or by the Superintendent for the Five Civilized Tribes, shall be subject to approval by the Secretary of the Interior; and, when approved by the Secretary of the Interior, shall be recorded in the office of the Superintendent for the Five Civilized Tribes, and in the county records of the county in which the land is situated; and said lands, designated and described in the approved certificates so recorded,

shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: *Provided,* That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: *And provided further,* That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.

STATEMENT

Houston Ward, a full-blood Chickasaw Indian, Roll Number 2922, received an allotment of 224.25 acres of land in Marshall County, Oklahoma, 94.25 acres being his homestead allotment and 130 acres his surplus allotment (R. 17–18). Prior to 1928 he had sold 120 acres of the surplus allotment with the approval of the Secretary of the Interior (R. 18). Thus, when the Act of May 10, 1928 (*supra,* pp. 2–4) became effective, Ward held title to only 104.25 acres of restricted lands, including his original homestead and 10 acres of his surplus allotment (R. 18–19). In 1929 Ward executed a certificate designating his homestead allotment of 94.25 acres as tax exempt, and the certificate was recorded in accordance with the provisions of Section 4 of the 1928 Act (R. 19). In 1941 Ward sold his entire homestead allotment after restrictions thereon had been removed (R. 18). Thereafter, on February 26, 1943, the Superintendent for the Five Civilized

Tribes executed a certificate designating the remaining 10 acres of the surplus allotment as tax exempt, which certificate was duly approved and recorded (R. 19). At no time had any other lands other than the homestead and 10 acres of the surplus allotment been selected as tax exempt by or for Ward (R. 19).

Meanwhile, the 10 acres of the surplus allotment had been placed upon the tax rolls of Marshall County for the years 1935 to 1940, inclusive, and were sold to the county in 1942 for nonpayment of taxes (R. 19–20). On July 21, 1942, the county conveyed the tract to petitioner Jack H. Smith by regular resale deed (R. 10–12, 20).

Under these circumstances, the United States, in its own behalf and on behalf of its Indian ward, instituted this action against the county officials and Smith to cancel the tax assessments, tax sale and deed, to restrain future assessments, and to quiet title to the 10 acres of his surplus allotment in Houston Ward (R. 1–5, 12–16). Petitioners defended on the grounds that, since the 10-acre tract was not designated as tax exempt at the same time the homestead was so designated, the right to select the 10 acres as tax exempt was lost; that in any event the selection of the 10 acres was not timely made, especially in view of the intervening assessments and tax sales; and that petitioner Smith would have no remedy if his tax deed were voided (R. 5–9, 16–17). Following the decision in *Zweigel* v. *Webster,* 32 F.

Supp. 1015 (E. D. Okla.), the district court concluded that under the 1928 Act, Ward was entitled to a tax exemption for the 104.25 acres remaining of his allotted lands, and that his failure to designate the 10 acres when he designated the homestead did not make the 10 acres subject to taxation (R. 20–21). The court held the tax sale and deed to Smith to be void (R. 21) and entered appropriate judgment (R. 21–23).

On appeal the judgment of the district court was affirmed by the court below (R. 30), which reasoned that the paramount purpose of Section 4 of the 1928 Act was to insure that up to 160 acres of the restricted allotments of members of the Five Civilized Tribes should remain exempt from taxation; that the provisions for designation of the lands to be exempt were not a condition precedent to the right to an exemption, especially when such an Indian owned less than 160 acres; that it was immaterial that the allottee here involved had made a partial designation covering another tract prior to the designation by the Superintendent of the parcel now in question; and that as between the Indian and the purchaser at the tax sale, the equities were in favor of the Indian (R. 29–30). The court below then concluded that the designation by the Superintendent of the 10 acres involved was valid, and that the designation related back to the effective date of the 1928 Act (R. 30).

ARGUMENT

1. By virtue of Section 29 of the Act of June 28, 1898, 30 Stat. 495, 507, and Section 1 of the Act of May 27, 1908, 35 Stat. 312, all the allotted lands of full-blood Chickasaw Indians were restricted against alienation and exempt from all taxation until April 26, 1931. Cf. *United States* v. *Rickert,* 188 U. S. 432; *Choate* v. *Trapp,* 224 U. S. 665. Section 1 of the Act of May 10, 1928, 45 Stat. 495 (*supra,* p. 2), extended the restrictions against alienation for 25 more years, or until April 26, 1956. In the absence of any provision for the taxation of the restricted allotments, they would have continued in a tax-exempt status until 1956. *United States* v. *Rickert,* 188 U. S. 432, 438; *Zweigel* v. *Webster,* 32 F. Supp. 1015, 1017–1018 (E. D. Okla.). Hence, it is plain that Congress, by providing in Section 4 of the 1928 Act (*supra,* pp. 3–4) that the restricted allotments in excess of 160 acres "shall be subject to taxation," intended to guarantee to the Indians that 160 acres of their restricted allotments would "remain exempt from taxation" while restricted and did not intend that the designation and recordation provided for in the same Section should be a condition precedent for the exemption. *Zweigel* v. *Webster,* 32 F. Supp. 1015, 1018–1019 (E. D. Okla.); cf. *Muskogee County* v. *United States,* 133 F. 2d 61, 64 (C. C. A. 10), certiorari denied (petition untimely filed), 319 U. S. 745; *Seber* v. *Board of County Com'rs,*

38 F. Supp. 731, 734–735 (N. D. Okla.), modified and affirmed, 130 F. 2d 663 (C. C. A. 10), affirmed, 318 U. S. 705; *United States* v. *Thurston County, Neb.*, 54 F. Supp. 201, 209–210 (D. Neb.), affirmed, 149 F. 2d 485 (C. C. A. 8), certiorari denied, October 8, 1945, No. 352, present Term. See S. Rep. No. 982, 70th Cong., 1st sess.; Hearing, H. Committee on Indian Affairs, H. R. 12000, 70th Cong., 1st sess. pp. 7, 74.

It is doubtless true that the provisions for designation of the 160 acres to remain tax exempt and for recording the certificate were inserted to assist the counties of Oklahoma in determining which of an Indian's restricted lands were taxable. But this is no indication that the exemption depended upon the procedural requirements of execution and recordation of the certificate. Moreover, there is no warrant for reading into the statute a time limit for the designation by the Superintendent. *Zweigel* v. *Webster*, 32 F. Supp. 1015, 1019 (E. D. Okla.). Congress did not impose such a limitation, and in the absence of a more definite statement of intention than the 1928 Act affords, it would indeed be contrary to all rules for the construction of Indian statutes to impute to Congress an intention to declare the tax exemption forfeited if for some reason the Indian or Superintendent failed or neglected to execute a certificate. This would be especially true when, as here, the Indian had less than 160 acres of restricted lands when the Act was passed (R. 18–19) and the reasons for

requiring a selection were non-existent since all his land was meant to be tax exempt. There is nothing in the statute which makes the lands taxable in the event of a failure to act.

2. Petitioners also complain (Pet. 20–21) of the conclusion of the court below that the designation made by the Superintendent after the land had been sold for taxes should relate back to the effective date of the Act. But, if, as has been shown (*supra*, pp. 7–9), the filing of a designation was not a condition precedent to the exemption, it is immaterial whether or not any designation had been filed at all, or a designation had been filed after the property had been sold. *Zweigel* v. *Webster*, 32 F. Supp. 1015 (E. D. Okla.). However, in any event, in order to do justice by avoiding the loss of the right to exemption, the use of the doctrine of relation back to make the certificate effective as of April 26, 1931, would be both logical and proper in this case. Cf. *McCurdy* v. *United States*, 264 U. S. 484, 487. The doctrine has been used in similar cases under a comparable statute (Act of May 19, 1937, 50 Stat. 188). *Muskogee County* v. *United States*, 133 F. 2d 61, 64 (C. C. A. 10), certiorari denied (petition untimely filed), 319 U. S. 745; *United States v. Thurston County, Neb.*, 54 F. Supp. 201, 209–210 (D. Neb.), affirmed, 149 F. 2d 485 (C. C. A. 8), certiorari denied, October 8, 1945, No. 352, present Term. In both these cases it was held that a designation made after assessment, but before the tax sale, re-

lated back to the effective date of the Act. The same reasoning is applicable when, as here, the designation was not made until after the sale. The county is in the same position whether the designation was filed before or after the sale. The only other party affected is the purchaser at the tax sale. But he is not in the position of a *bona fide* purchaser for value without notice, and as to him the doctrine of *caveat emptor* applies. *Howerton* v. *Board of Commissioners of Tulsa County,* 191 Okla. 169. The purchaser's remedy in the situation in which he found himself was to seek relief from the county's Re-Sale Property Fund as provided in Oklahoma Statutes Annotated (1941), Title 68, sec. 432 (l), rather than at the expense of the Indian owner. Moreover, the tax sale in this case took place in 1942, more than two years after the decision in *Zweiger* v. *Webster,* 32 F. Supp. 1015 (E. D. Okla.), wherein it was held that the absence of a designation did not prevent the invalidation of a tax deed. Surely, the county and the purchaser must be considered to have run the risk of acting contrary to the prevailing interpretation of the law.

3. Petitioners' contention (Pet. 20) that the Superintendent had no power to file a certificate covering the 10 acres at issue because the Indian ward had already filed a designation of 94.25 acres has no support in the statute. As has been shown (*supra,* pp. 7–9), the 10 acres were exempt from taxation whether or not a designation was

filed. Furthermore, there is no provision in the Act from which it can even be implied that the designation of the 160 acres must be made at one time or the exemption lost to the extent not covered by the first designation. Cf. *Zweigel* v. *Webster,* 32 F. Supp. 1015 (E. D. Okla.). In fact, the final sentence of Section 4 points to the contrary.[1] Hence, since the Indian had failed to exercise his rights to the fullest extent, there can be no doubt that under the statute the Superintendent could file a supplemental designation.

4. Petitioners also urge that the interpretation of the statute by the courts below would seriously disrupt the tax-collecting machinery of most of the counties of Oklahoma (Pet. 8–9). But, since the county had no right to place the lands here involved on the tax rolls, it is immaterial that the voiding of the tax assessments and tax sale might disrupt its tax-collecting machinery and embarrass its finances. *Board of Commissioners* v. *Seber,* 318 U. S. 705, 718. Petitioners' further argument that the courts have been too liberal in determining the legislative intent in connection with Indian statutes (Pet. 15–19) is likewise without any logical basis. In fact, with respect to two of the three instances cited by petitioners (Pet. 15–16, 18), the curative legislation plainly approved the interpretation of the statutes by the

[1] This sentence reads: "That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres."

courts and merely provided relief to those individuals misled by their own statutory misinterpretations, at the same time leaving in effect the courts' interpretations for future transactions. The fact that in the third instance (Pet. 17–18) Congress in effect amended the statute is no indication that the courts incorrectly interpreted the original legislation. In that instance, Congress apparently had a change of heart. Rather than indicating that the courts have been too liberal in construing Indian legislation, the instances cited by petitioners indicate that if their cause is meritorious, a remedy should be sought in Congress rather than in the courts.

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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